Sir WILLIAM HAMILTON gives also the following opinion we cannot adopt: "We have no more right to say that the brain *feels* at the *finger points*, as consciousness assures us, than to assert that it *thinks* exclusively in the brain." Let us examine this proposition: When *I know* that I feel, I am aware it is not in my finger the operation of knowing took place; there was a sensation which must not be mistaken for a *perception*. Everybody knows a sensation does not generally determine its cause, but the perception analyzes its conditions and leads to the conception. But supposing, with Sir WILLIAM, that nerves are only *elongated brains*, although it is quite in opposition with anatomy, what would be the advantage of such opinion? True, we are then at a loss to know where the seat of intelligence may be, but it is not its seat that would give us a light on the nature of insanity—whether purely spiritual or exclusively material—and that is the important question. Now, the somato-psychical theory confesses the *unknown relation of soul and matter in the human mind*. Evidently, the material side of the question has more chances of solution if we admit the presence of the soul in the nervous centres and not in the extremities. There, only, the soul necessarily objectivates itself as having acted in the perception and sensation.

We finish this first part by acknowledging that if it had not been for the elaborate and very clear essay of Mr. Wetmore we would not have been able, for our own benefit, to disentangle the intricacy of laws and statutes on insanity, and especially to know anything about their history. In a future communication the more complicated cases of testamentary capacity, relative to positive insanity, will be examined. J. P.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

THE YORK COUNTY M. F. INS. CO. *vs.* A. O. BROOKS.

Where a surety to a bond signs upon the assurance that the principal will also procure two other persons, specified and known to such surety, to sign the bond before he delivers the same, which he fails to do, but this is wholly unknown to the obligee at the time he accepts the bond, such surety is bound to perform the obligation.

Where the third surety upon a bond signs under the belief that the former signatures are genuine, but one of them is, in fact, forged by the principal in the bond, who erases such forged signature before he delivers the same to the obligee, who is wholly ignorant of these facts at the time, such surety cannot defend against the obligation.

APPLETON, C. J.—The defendant, A. O. Brooks, having been employed by the plaintiffs, as their agent to collect their outstanding assessments, gave them the bond in suit as security for the faithful performance of his trust. The plaintiffs received it ignorant of any agreement between him and the other defendants, or of any relations between them other than those arising from their respective signatures. Brooks having failed to pay over the moneys collected, the plaintiffs seek to enforce the bond in suit for the purpose of obtaining indemnity for the loss sustained.

John W. Perkins, the first surety on the bond, claims to be discharged because he "signed it on the promise of A. O. Brooks, that he would procure the signature of Robert G. Perkins," which he failed to do. The existence of this promise was unknown to the plaintiffs, and it is no fault of theirs that it was broken. This defendant neither signed the deed on condition nor delivered it as an escrow. He relied upon the promise of his principal, and he is not the first surety and probably will not be the last, who has found a reliance on such promises like leaning upon a broken staff. He undoubtedly expected the promise to be performed, but the disappointment of his expectations constitutes no answer to the plaintiffs' claim. When a bond is signed and delivered without any condition or reservation annexed, although under an expectation that it would be signed by others, it is the deed of the person signing, though it should not be signed by those whom he expected to sign it: *Haskins* vs. *Lombard*, 16 Maine 140. So, too, where a note payable to a bank was signed by the principal and one surety, an agreement on the part of the principal with such surety, that he will procure another surety, which is not done, before he procures the note to be discounted, constitutes no defence unless the officers of the bank were conusant of such agreement: *The Passumpsic Bank* vs. *Goss*, 31 Vermont 315; *Dixon* vs. *Dixon*, 3 Vermont 450.

It is admitted that the name of Robert G. Perkins, affixed to the bond, was a forgery, and was erased therefrom before its delivery to the plaintiffs, and that there was no appearance of his name on the bond when delivered, nor that it had ever been there.

The other defendant, John Perkins, alleges that he "signed the bond on the faith of the name of Robert G. Perkins, whom he knew to be a man of property," but, as that was a forgery, he denies his liability. But it was his neglect that he was ignorant of the genuineness of the signatures which preceded his own. He imposed no conditions limiting the legal effect of his signature. A surety on a bond cannot interpose as a defence against paying for the defaults of his principal that the name of another surety upon the same bond was obtained by fraud, unless the signature of the latter was a condition by which to obtain that of the former: *Franklin Bank* vs. *Stevens*, 39 Maine 533. Perkins made no conditional signature, nor was there a conditional delivery. A subsequent surety is not to be discharged because the name of a prior one has been forged. His own signature is an implied assertion on his part of the genineness of those preceding it, for it is not to be presumed that a man would affix his name to a bond when the prior names were forged. It was held in *Selser* vs. *Brock*, 3 Ohio 302, that one who signed a note, apparently as principal, but who was, in fact, a surety within the knowledge of the holder and affixed his signature after the names of others, as signers had been forged upon the note, and while it was in the hands of him for whose benefit it was drawn, so far sanctioned and affirmed the genuineness of the signatures, that he could not take advantage of the fraud in his defence against the holder, unless he show the holder was privy to the same. 1 Parsons on Notes and Bills 235.

The name of Robert G. Perkins was erased before the bond was delivered to the plaintiffs. They never knew it had been fraudulently affixed, nor of its subsequent erasure. Such alterations only as are material will defeat a bond. The forgery imposed no liability on the person whose name was forged. Its erasure neither released nor discharged him from any. The surrender of

a fictitious and forged bond for the benefit of the surety, to whom the same was of no possible use, except as a matter *in terrorem*, affords no ground upon which a court of equity will decree the exoneration of a surety: *Loomis* vs. *Fay*, 24 Vermont 240. The defendants would have been liable had the erasure not been made. The erasure has in no respect altered their rights nor affected their liabilities. Their liability still continues.

Defendants defaulted.

We are indebted to the courtesy of Chief Justice APPLETON for the foregoing opinion, and it seems to us to embrace some points of considerable practical interest. We had occasion to advert to the general subject, in a brief note to Seely *vs.* The People, 2 Law Reg. N. S. 344, 346. But the points presented in the present case arise somewhat differently, and the decision of the court here is not, perhaps, entirely in consonance with that of the court of Illinois, in that case.

I. The first question made in this case seems to us entirely one side of the principle upon which it is attempted to be placed by the defence. That one who signs a bond, as surety, upon the assurance of his principal, that he shall also have other responsible co-sureties which are never procured, and the bond nevertheless delivered, is deceived and defrauded of his indemnity, no one can question. But whether he shall himself bear the loss, or visit it upon the obligee, is quite a different question. And it seems to us, upon principle, that where there is nothing upon the face of the paper, indicating that other co-sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest, to any extent, upon the obligee.

And, on the other hand, where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument in order to give it full validity against all the parties, he makes such principal his agent, to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions. And if the principal, under such circumstances, gives any assurances to the surety, in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, the surety giving confidence to such assurances must stand the hazard of their performance, and cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.

It seems to have been held in a majority of the American cases, that, in order to put the obligee upon inquiry even, some indication upon the face of the paper, such as the insertion of other names in the body of the bond, or some memorandum attached to the signature

of the surety, indicating the condition upon which he signed, should exist, or else some notice in *in pais* to the obligee, which might fairly be regarded as equivalent. And that without this the obligee is not chargeable with any positive default; and if there has been default on the part of the obligor, the bond may be enforced.

II. But the great difficulty arises upon the correlative question in the case, that is, how far the sureties have been guilty of any such want of care and prudence in the manner of giving their signatures as to estop them from showing that the bond, as to them, was an incomplete instrument, and, in fact, delivered, as far as there was any delivery, merely as an escrow. For if there has been no legal fault on the part of the obligor, the bond certainly cannot be enforced against them. And it must be confessed that the recent English decisions, and especially that of Swan *vs.* The North British Australasian Company, 10 Jur. N. S. 102 (1864), in the Exchequer Chamber, bear very much in favor of the sureties in this bond. This case was tried before the Court of Exchequer, 8 Jur. N. S. 940; and the same question was also tried before the Common Pleas, 7 C. B. N. S. 400, and finally, after very careful and patient examination, decided in the Exchequer Chamber, before the Lord Chief Justice COCKBURN, and six of the pusine judges, all, except KEATING, J., concurring in the decision.

It was here held that where A. was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A., being shares in the defendant's company, and by means of a duplicate key, which he had procured to be made without the knowledge of A. obtained certificates from a box of A.'s, necessary to perfect the transfers; and he also forged the names of the attesting witnesses. In an action against the company for damages, and for a mandamus to restore the plaintiff's name to the register, it was held that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery.

It must be conceded that many of the American cases, in attempting to follow out the principle of the case of Lickbarrow *vs.* Mason, 2 T. R. 70, that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it, have held many parties estopped from showing the true state of the facts in their defence, upon much slighter grounds than the late English cases require. The principle of these American cases is fairly brought to view by the manner of putting the case by KEATING, J., in his dissent from the other judges, that one who, by his culpably negligent act, enables his agent to commit a fraud to the prejudice of third persons, by fabricating a transfer of the shares in question, is justly estopped from defeating the effect of such transfer by showing that it was made contrary to his expectations.

This view of the question will unquestionably sustain the decision in the principal case. But when it is considered, on the other hand, that this whole ground has been so thoroughly reviewed by two of the superior courts in Westminster Hall, and in the Exchequer Chamber also, and so very recently, and with the same result, in all the other courts, it cannot fail to raise grave doubts in the minds of the American courts, who have followed the opposite view, whether there be not some fallacy in the extent to which they are

pushing the doctrine of estoppels *in pais* upon the mere ground of negligent omission. The English courts are, of late, certainly requiring something more than mere omission and negligence to create an estoppel *in pais*. It must be conduct amounting to an implied license, or else it must be wilful and fraudulent: Patchin *vs.* Dubbins, Kay 1.

We confess to a strong inclination, in questions affecting specialties and simple contracts not negotiable, to favor the English rule. It seems to us that too many of the American cases, in striving to require good faith and diligence of the obligor or promissor, have quite too much overlooked the corresponding obligations on the part of the obligee. We can see no good reason why the obligee, who, in accepting the bond, trusts to the representations of the principal obligor as to the execution of the instrument by the others, who are known to stand as mere sureties, should be any more entitled to screen himself from the consequences of those representations proving false, than should the obligor. The true rule in such case seems to be that each party may stand upon *the facts of the case*, unless he has been guilty of *fraudulent misconduct*. This is certainly the present English rule upon the subject, and the one which we believe will ultimately prevail in this country.

I. F. R.

New York Court of Appeals.

ELISHA B. MORRELL *vs.* THE IRVING FIRE INSURANCE COMPANY.

A building was insured against fire to the amount of $3000 by A., and to the amount of $2000 by B., in separate policies, each of which contained the following clause: "In case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind or quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss," &c.

The building having been destroyed by fire, A. and B. served a joint notice upon the insured, that they were prepared to rebuild, and requested plans and specifications, which were furnished accordingly. The building having been reconstructed, the insured insisted that the contract to rebuild had not been substantially complied with, and brought an action on the policy against A., claiming to recover the full amount of his original loss: *Held*, that he could not recover.

After the election and notice, a contract to rebuild existed between the parties, of such a kind that the contractor had received the entire consideration in advance. If this contract is not fulfilled by the insurer, he is liable for the damages sustained by the non-fulfilment of the contract, which may be more or less than the amount insured. The action, consequently, should have been brought to recover damages for breach of contract.

It seems that the action might have been brought against both insurers jointly or either separately.

The defendant insured the plaintiff against loss or damage by fire, to the amount of $3000, on a certain three story brick building in the city of Brooklyn, for one year from March 20th 1856. The policy contained a condition that "in case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged, with others of the same kind and quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so, within twenty days after having received the preliminary proofs of loss required by the 9th article of these conditions."

The building was destroyed by fire January 6th 1857. The action was upon the policy to recover the $3000 and interest. The plaintiff made the proof necessary to entitle him to recover. The defendant then read in evidence a policy of insurance upon the same building made by the Excelsior Fire Insurance Company for $2000, containing the like condition. The plaintiff also put in evidence a joint notice of both companies to the plaintiff, dated January 27th 1857, that they were prepared to rebuild the said building, and requested the plaintiff to furnish them with the plans and specifications of the same. The defendant then gave evidence tending to show that plans were furnished by the plaintiff to a builder employed by the companies; that the work of rebuilding was commenced in February, and was completed within a reasonable time, according to the plans furnished, and that the building was thereupon occupied by the plaintiff. The plaintiff gave evidence tending to prove that plans and specifications were furnished, and that the building was not properly constructed according to the plans and specifications, and that there had not been a substantial compliance with the stipulation to rebuild. The defendant gave further evidence upon this question tending to prove full performance of the work. It should be stated that the defendant, after putting in their evidence in chief, moved to dismiss the complaint on the ground that the action should have been brought upon the condition or covenant to rebuild, and not upon the policy.

The motion was denied, and the defendant excepted. At the close of the evidence the motion was renewed on the ground that it was shown that the two companies elected to rebuild, and made a joint contract to rebuild, and did jointly rebuild, and therefore the suit should be jointly against both companies. This motion was denied, and the defendant excepted. The court, after stating the case and some facts not in dispute, stated that the company undertook to rebuild and did construct a building upon the same lot, and that the question is whether they have substantially complied with the condition of the policy touching the rebuilding. That it was the right of the parties to the contract to change it in regard to the form of the structure and the material of which it was composed. And if the company have put up such a structure as Morrell required, it is a sufficient performance of the condition, and the plaintiff cannot recover.

"To make out the defence, the jury must be satisfied from the evidence that the new building, in respect to form, material, and goodness of workmanship, is substantially like the building destroyed, as the same were described in the plans and information given to the company by Morrell." "That if the jury are of the opinion that the company have failed to fulfil the condition and reconstruct the building in the manner which I have before specified, then the plaintiff is entitled to recover the amount of the loss, without reference to the value of the building which the company have put upon the premises."

The counsel for the defendant excepted in the language of the case: "1st. To so much of the charge as submitted to the jury the question in this case whether the defendants rebuilt as the building was before the fire. 2d. As to the measure of damages submitted." There were some requests to charge, some of which were complied with, and others not, and, as to some, the court refused to charge otherwise than as it had already charged.

The verdict was for the plaintiff $3315. Judgment was entered upon the verdict, and upon appeal to the general term it was affirmed, and thereupon the defendant appealed to this court.

J. N. Gilbert, for the plaintiff.

E. Fitch, for defendant.

The opinion of the court was delivered by

MARVIN, J.—This is a new case to which we are to apply, after ascertaining the contract between the parties, principles of law well settled.

It is well-settled law in this state that he who undertakes to build a house for another, or to perform any work, to be paid for when the house is completed, or the other work done, cannot recover any portion of the stipulated price or value of the work until he has substantially performed the contract on his part: *Smith* vs. *Brady*, 17 N. Y. R. 173, and cases therein cited. It is also well-settled law that when one contracts with another to build for him a house, or do other work, and agrees to pay portions of the consideration in instalments as the work progresses, and does so pay, or pays the whole consideration in advance of the performance of the work, he can maintain no action for money had and received, though the contract has been broken and remains unperformed unless the contract has been wholly rescinded. His action must be upon the contract, and his damages must be for the breach or breaches of the contract. The amount of damages will not depend upon the amount of money he had paid, but the damages will be the amount of loss sustained by a failure to perform the contract. In other words, what it will cost to procure a full completion of the contract, including, if the case calls for it, any special loss by reason of delays, &c. In the present case the first of the above principles has been applied, and the defendant has been placed in the position of one who has contracted to construct a building in a certain manner, and for which he is to be paid after the work is done, and who claims that he has performed the contract, and seeks, by action, to recover the consideration, and is met with the issue that he had not performed the condition precedent, upon the performance of which his right of action depends. This issue being decided against the defendant, it is held that he is to have nothing on account of the house actually built, but is to pay to the plaintiff the entire sum specified in the policy as indemnity to the plaintiff for the loss of his building.

I am not satisfied that this rule should be applied to the case.

It is important to determine, with some precision, what the case is—what the contract was between the parties. It is said that the contract was, on the part of the defendant, that in consideration of a sum presently paid, it would indemnify (the contract is insure) the plaintiff to the amount of $3000 for any loss he should sustain by fire on a certain building; and the defendant promised and agreed to make good to the plaintiff, &c., all such loss or damage not exceeding in amount the sum insured, as shall happen by fire to the property specified. But this was not the entire contract. One of its terms and conditions was that in case of any loss or damage to the property insured, it should be optional with the company to rebuild or repair the building within a reasonable time, giving notice to do so within twenty days after receiving the preliminary proofs of loss. What construction should be given to this provision? What relation was established by it between the parties? The agreement is not exactly that the defendant shall do one of two things, one of which being performed satisfied the contract. There is no absolute contract that the defendant, upon the happening of a certain event, should pay a sum of money *or* rebuild the house. But the agreement was that the defendant should pay an amount of money equal to the loss, not exceeding $3000. Call it an indemnity for the loss, and the question will not be changed, for the company might within twenty days after proof of the loss, elect or decide to rebuild the building, and give notice of such election or decision. In other words, the defendant had the right by the contract to elect to rebuild, and in that way indemnify the plaintiff by rebuilding. When the election to rebuild was made and notified to the plaintiff, what was the relation between the parties? The building had been destroyed by fire. The amount of the loss may or it may not have been known. There may have been dispute between the parties touching the amount of the loss. The insured could only claim $3000, though the loss may have been greater. He could only recover his actual loss as an indemnity, but the actual amount of the loss may have been, and often is, a matter of dispute and difficulty requiring a lawsuit to settle

it. The insured may claim a much greater sum than the insurer is willing to pay, and for the purpose of avoiding the difficulties and litigation likely to arrive from such disputes, the insurer secures, by the contract, a right to indemnify the insured by rebuilding the destroyed building instead of paying money, the amount of which is uncertain, and the insured agrees to accept indemnity in this way in lieu of any amount of money. All necessity for ascertaining the amount of the loss ceases when the insurer undertakes the restoration of the property. It seems to me that when the insurer elects to rebuild, and gives notice of such election, the contract at once is that the insurer will rebuild absolutely in consideration of the premises, and the defendant's agreement is that the insurer may do so, in satisfaction of the demand, uncertain in amount, which he claims of the insurer. This becomes the absolute agreement between the parties, by virtue of the agreement originally made, and which, prior to the election, was subject to certain contingencies, terms, and conditions; and it seems to me that after such election and notice, the relation between the parties is simply that of a contractor to build, who had received the entire consideration in advance, and a party for whom the building is to be erected and who has made full payment, therefore, in advance of the work. Such, I think, is the fair construction of the contract. This provision was intended to obviate difficulties, some of which have been suggested. In this view no action could be maintained for the purpose of recovering the $3000, or such portion of it as should be equivalent to the loss. There can be no inquiry as to the amount of the loss. The action will be upon the contract to rebuild, and the amount of the damages to be recovered upon a breach of the contract, will be determined as in other actions for the breach of building contracts, and such amount may exceed the $3000. The defendant agreed that it would build the house, and it has been paid for its agreement and must perform the agreement or pay the damages.

The peculiar language used in this provision has not escaped attention. "It shall be optional with the insurance company to replace and to rebuild," the insurance company "giving notice of

their intention to do so." It may be said that the language is not sufficient to make a present contract to rebuild after the election and notice. That although the defendant had the optional right to rebuild and elected to rebuild, and gave notice of intention to do so, still it was not bound to go on and build, but it might stop and leave the insured to his remedy for a moneyed indemnity. This is not, in my opinion, the fair construction of the provision, nor was such the intention of the parties to the contract. The option was with the defendant, and it was to give notice of its election. The language as to the notice may not have been very happily chosen in using the word "intention" instead of the words *election*, *option*, or *choice;* but there can be no difficulty about the meaning. The right to rebuild, and the obligation to rebuild, depended upon an election to rebuild, and the notice was simply to inform the other party that such election had been made. The parties so understood the language. The notice actually given in this case said nothing about intention. Its language is: "We hereby give you notice that we are prepared to rebuild said building," and this was treated as sufficient, and both parties acted upon it. It seems to me very clear that, after the election and notice, there existed a contract between the parties for the rebuilding of the building destroyed, and the contract to make good in money the loss no longer existed between the parties. If I am right in the view taken of the contract, the position that the contract for indemnity in money remained in force until the house was actually rebuilt, must fail. This position would seem to regard the provision as an *accord* not valid as a *satisfaction* until executed, whereas I regard it as a part of the *original agreement* by which this provision might, upon the happening of a certain contingency, be substituted by the election of one of the parties for and in the place of the provision to indemnify in money, and it is the agreement of both parties, and both are bound by it. It is, I submit, an error to suppose that this was a conditional agreement by which, when performed, the previous agreement to pay in money was satisfied, and if not performed, then such money agreement remained in force. I have read carefully the dissenting opinion of Justice EMOTT in the court below;

and though I am not able to concur fully in his construction of the contract, I have no difficulty in adopting his argument against the rule of damages enunciated at the circuit.

Assuming that the agreement to indemnify in money was not entirely superseded by the agreement to rebuild, what would the rights of the parties be upon a failure or partial failure to rebuild? The defendant had the right to satisfy the claim for the loss by rebuilding. Suppose the loss to have been $3000, and the insurer expends $2000 judiciously and profitably towards the rebuilding of the house, and then stops, and the insured takes up the work and completes the house by expending $1000? Has not this claim for damages been partially satisfied? I certainly think so; and this is the position of Justice EMOTT. He applies to the case the same principles applicable to an action against a contractor for a breach of the contract to build, and refuses to apply the strict rule against a contractor who seeks to recover the price, and is met with the objection that the work has not been completed according to the contract. But the learned justice limits the the recovery to a sum not exceeding the amount that would have produced indemnity had the agreement to rebuild never existed, and in this we differ. It seems to me that this rule will be very difficult in practice. The indemnity in money can never exceed the amount of the risk specified in the policy. Suppose the risk taken to be $3000, and the insurer elects to rebuild and actually expends, necessarily and properly, $3000, and the building is not completed, may he stop and leave the building to be completed by the insured at, say, the cost of an additional $1000? This must be so if the insured in such case is only entitled to an indemnity, measured by the sum of money specified in the policy; for the $3000, having been judiciously expended, is worth so much to him. The learned justice, however, lays down the rule, that the plaintiff is entitled to recover such an amount not exceeding the amount of the insurance as will be necessary to make the building erected equal in all respects, and similar to the one burned. The result of this rule would be, in the case above supposed, that the plaintiff could recover the additional $1000 expended by him though the defendant had ex-

pended already the full amount insured, and this is precisely what I claim. But suppose the insurer expends $1000, and it costs $3000 to complete the building, the insured, by the rule laid down, will recover $3000. Will he not in such a case realize for indemnity $4000? Certainly he will. Or suppose the insurer expends $2000, and the insured $3000, to complete the building, the latter will recover the $3000 and thus realize $5000. He is to recover such an amount as will be necessary to complete the building, not, however, exceeding the amount of the insurance. Under such a rule, an insurer who has elected to rebuild, and has performed a part of the work and discovers that he has a hard bargain and cannot complete the work for the amount of the insurance, will at once abandon the work or may do so, being liable only for the payment of the amount insured. Under such a rule the amount of the loss will always come up for litigation and adjustment, and, as I understand, the principal object of the provision we are considering, is to permit the insurer to obviate all disputes and litigation touching the amount of the loss by replacing the articles lost or damaged, or by repairing and rebuilding the building destroyed. By adopting the construction for which I contend, we have a simple rule which excludes any inquiry as to the amount of the loss, and the inquiry will be, has the insured replaced the articles or rebuilt the building in the manner agreed, and if not, the damages will be as in other cases of the breach, by the builder, of his agreement to build.

It is supposed that, in a case like the present, difficulties exist touching parties to the action. I think that the supposed difficulties will disappear upon a brief examination of the law applicable to such cases. The plaintiff held two policies upon the same building, one issued by the defendant, taking a risk of $3000, the other issued by the Excelsior Fire Insurance Company, taking a risk of $2000. Each policy contained the same provisions or condition touching the optional right to rebuild. In this case both of the companies elected to rebuild, and they united in one notice that they were prepared to rebuild. The case does not contain, as it should, the policies. But they were, of course, both *valid*,

and, in contemplation of law, constituted one policy, so far as the amount of loss was concerned. That is to say, the insured could not recover the amount of his loss of each insurer supposing it had been less than the smallest risk. All he is entitled to from all the insurers is one indemnity. If he recovers this of one of the insurers, such insurer may recover of the other, by way of contribution, his proper proportion. It is very common in this country to provide in fire policies, that in case of two or more insurances upon the same property, each insurer shall be liable only for a rateable proportion of the loss. See Par. Mer. L. 516, 517.

Whether it was provided in the present case that each company should only be liable for its rateable proportion of the loss does not appear, but I think this will be seen not to be material. Though the plaintiff could not have maintained a joint action against the companies upon these policies if there had been no election to rebuild, but could have maintained separate actions, recovering from the defendant three-fifths of the loss not exceeding $3000, and from the other company two-fifths not exceeding $2000, it does not follow that, upon an election by both companies to rebuild, he could not maintain a joint action against both upon the agreement to rebuild, I think he could maintain such action, and that the action in this case should properly have been against both companies. When they jointly elected to rebuild, they jointly agreed to rebuild, and were jointly liable in an action for a breach of their agreement. I have no doubt the action would have been well brought against both companies. They would not be permitted to allege that they had not jointly contracted with the plaintiff. I am not prepared to say that the action was not well brought against the defendant alone. I think the plaintiff might well treat the election to rebuild as the election of each insurer, and for a breach of the building agreement maintain his action against either company, and recover full damages, or perhaps a separate action against each for full damages, collecting the damages, however, but once. I think these positions follow from the legal relations and rights of all the parties. The two companies were bound to pay the loss rateably if so stipulated in the policies,

and if not so stipulated, the whole loss should be paid by one, then the other would be liable for contribution. When one of the companies should elect to rebuild it would come under obligation to the insured to make full indemnity by rebuilding; and if there were a provision in the policy that it should only be liable to pay a rateable proportion of the loss, such provision would be superseded by the agreement to rebuild. If only one of the insurers should elect to rebuild and should perform the building contract, it would be entitled to contribution from the other company, not a proportion of the amount expended in building, but a rateable proportion in money of the actual loss. So also if the party undertaking to rebuild should fail to perform the contract, and the insured should recover and collect damages for the breach of the agreement, such party could recover of the other insurer a rateable proportion of the loss. Such insurer would, by the payment of the damages recovered by the insured, have satisfied the demand for the loss. The insured would be fully indemnified, and the insurer who paid nothing and did nothing would be liable for contribution. In my opinion, the insured, in a case like the present, may have his action against both insurers jointly, or against either separately, and recover his full damages for the breach of the building contract, and leave the two insurers to an adjustment of their rights between themselves according to well-settled rules of law applicable to different insurers of the same property. The judgment should be reversed, and there should be a new trial.

DENIO, C. J., read an opinion to the same effect. DAVIES, WRIGHT, ROSEKRANS, and BALCOM, Js., concurred. SELDEN and EMOTT, Js., dissented.

I. The principle underlying the main proposition in this case is laid down in Coke upon Littleton, 146 A.: *Electio semel facta, et placitum testatum non patitur regressum. Quod semel placuit in electionibus amplius displicere non potest;* or, as an English judge translates it, the parties have made their election and cannot now change their mind. When an insurance company elects to rebuild, and gives a proper notice to that effect, it is bound to rebuild, and cannot abandon the contract, although its fulfillment may become difficult or even impossible. If it is bound to rebuild, it may insist upon its right to complete the contract. This point was much discussed in Brown *vs.* Insurance Society, 5 London Jurist N. S. 1255; s. c. 8 Am. Law Register 235. The facts in that case were that

the insurers had elected to rebuild, and the public authorities caused the building to be taken down as a structure in a dangerous condition. This condition was not caused by the fire, and if the interference of the authorities had not taken place, the defendants would have restored the premises to the condition they were in before the fire. These facts constituted no defence. Lord CAMPBELL'S opinion is especially clear: "The defendants undertook what was lawful to be done, and whether it can be done in point of fact is immaterial. They must do it or pay damages. They are in the same situation as if the policy had been absolute to reinstate the insured premises in case of fire. When an election is given by a contract, and the election is made, it is the same as if there had been no election, and the party making the election is absolutely bound to do that which he has elected to do. * * * The company undertook to do that which was lawful, and what continues to be lawful, and whether it can be done or not seems to me to be quite immaterial; they must either do that which they have undertaken to do, or pay damages for not doing it." The case was thought to be governed by such authorities as Paradine *vs.* Jane, Aleyn. R. 27; Hadley *vs.* Clark, 8 Term R. 267; Hall *vs.* Wright, 5 Jur. N. S. 62; s. c., in Exchequer Chamber, 1 Ellis, Black. & Ellis 746. Similar cases in this country are Harmony *vs.* Bingham, 2 Kern. 99; Adams *vs.* Nichols, 19 Pick. 275; School District *vs.* Dauchy, 25 Conn. 530; Trustees of Trenton *vs.* Bennett, 3 Dutcher 514; Tompkins *vs.* Dudley, 25 N. Y. (11 Smith) 272.

It may well be that such a result may not have been anticipated by the insurance company. Its object in causing the elective clause to be inserted in the policy may have been to hold a check upon an extravagant claim for loss. Nevertheless, if it once elects to rebuild, it runs the risk of any rise of price of materials, or of any extraordinary and unexpected difficulty in fulfilling the contract. It *must* rebuild or pay damages. The ordinary rules governing insurance are dispensed with, and the case is governed by principles applicable to contracts in general.

We have thus far assumed that the insurance was entered into by a company of which the insured is not a member. In the case of mutual insurance companies, the question will be complicated by the fact that the insurance still continues. Where the company is not mutual, and the premises are destroyed, as soon as the house is rebuilt the contract is fully performed. The old policy will not cover the new building. There is no aliment upon which the original policy can feed. But in mutual companies the insured still remains a member of the company, though his property is destroyed and rebuilt by the insurers. He is liable for assessments during the whole term of the policy. N. H. Mutual Fire Insurance Company *vs.* Rand, 4 Foster 428; Swamscot Machine Company *vs.* Partridge, 5 Id. 369. Under such circumstances, if the insurers rebuild at a cost less than the amount of insurance, they are insurers of the new building for the difference; and if it is damaged by fire, an amount can be recovered not exceeding such difference: Trull *vs.* Roxbury Mutual Fire Insurance Company, 3 Cush. 263. In this case the insurers insured the plaintiff $2000 on two buildings ($1000 on each) for seven years, with a right to rebuild. The buildings were destroyed by fire, and the insurers replaced the one for $800, and the other for $650. The new buildings were destroyed by fire within the term, and the insured

was allowed to recover on the original policy the sum of $550, being the difference between the sums insured and the sums paid for former losses. The reasoning of the court proceeds upon the peculiar relation between a mutual fire insurance company and a party insured by it.

II. The case seems very clear when the contract is between the insured and a single insurer. Complicated questions present themselves where there is a number of separate insurers. These separate insurances cannot be regarded as a single contract, but only as a series of contracts. True, the law may impose upon such insurers certain mutual obligations growing out of suretyship, such as contribution, &c., but all these are implications from the *original* contract. If any of such insurers should elect to rebuild and thus make a *new* contract binding on itself, it cannot affect any other insurance company which does not choose to rebuild. It is a grave question whether the insurer electing to rebuild would not lose all right of contribution from the other insurers on the ground that they were liable only on the original engagement and would be discharged when the substituted agreement had taken its place. However that may be, it seems entirely clear that no special liability could grow out of the substituted contract as against the insurers who do not elect to rebuild. Thus if A. is insured by B. and C. separately, and B., after a loss, elects to rebuild and incurs extraordinary expense from the unexpected rise of materials or labor, he cannot charge any portion of this expense upon B., for his contract only binds him to indemnify A. against loss in the ordinary manner.

Suppose, however, that B. and C. should each elect to rebuild, and should give the proper notice to that effect, it does not seem to us that there is in that case any privity or mutual relationship between them. The election, as we have seen, forms a substituted contract, the effect of which is quite different and distinct from the ordinary contract of insurance. It is not unlike the case where an owner of land has paid each of two contractors the entire price for building a house on his estate, or where a person has paid each of two mechanics the price for repairing a chattel. He can compel either one to perform his contract, and the one performing has no action against the other, for there is no privity of any kind between them. He has simply done what he agreed to do by a separate and independent engagement. So in the case of the insurers who have elected to rebuild, the notion of *indemnity* is laid aside, and they are under special and distinct engagements to fulfil an ordinary builder's contract. We do not see how such persons could be sued in *one* action, and doubt the soundness of the *dictum* of MARVIN, J., in the principal case to that effect. This *dictum* appears to be inconsistent with the general course of his reasoning, in which we entirely concur. He says with correctness that the right to rebuild, and the contract to rebuild, grow out of the original agreement to insure. As the original agreement to insure is separate and distinct by each insurer, we do not see how any substituted agreement growing out of two distinct agreements can be joint. The substituted agreement must, as a matter of course, be of the same nature as the original contract. When that point is directly presented for adjudication, we cannot doubt that it will be held that each insurer must be sued separately on the substituted contract, because his original contract is single.

To sum up briefly our ideas on this subject. An ordinary insurance policy

is an agreement to indemnify against loss existing when property is destroyed, either partially or totally, by a peril embraced within the terms of the policy. No subsequent rise in the value of the property will produce any effect upon the insurer's liability, nor would the insurer be liable for any subsequent loss occasioned by a cause not within the policy. On the other hand, an agreement to rebuild is not an insurance against a *loss existing when the peril occurred.* It is an agreement to reinstate the property. It may serve to protect the insured against *future* losses not within the policy, so that if a building partly destroyed by fire is taken down by the public authorities, the insurers must still rebuild. So if a building partly destroyed by fire, was afterwards fully destroyed by the act of God, as by a storm, the insurers must rebuild. An insurer may contract that, when a loss occurs, he shall be liable on the theory of indemnity against the existing loss, or that he shall be held at his option on a substituted contract to rebuild. When his election is made, he cannot withdraw it. Each of two separate insurers may make the same election, when the substituted contract to rebuild will be of the same separate nature as the original contract to insure. One of two separate insurers cannot, by his election, impose any new obligations upon a co-insurer who makes no such election, and it may be doubted whether the duty of the non-electing insurer to contribute for a loss within the policy is not extinguished by the substitution of the new agreement in the place of the one on which he was, by an implication of law, originally liable.

These considerations would lead to the conclusion that it is injudicious for insurers to avail themselves of the elective clause unless under special and peculiar circumstances.

T. W. D.

Supreme Court of Michigan.

THE PEORIA MARINE AND FIRE INSURANCE CO. *vs.* REUBEN S. HALL.[1]

If one partner insures the property in his own name only, and there is no evidence to show that the insurance was really intended for the benefit of the partnership, or that the premium was paid from the partnership funds and the transaction subsequently ratified by the other partner, the policy will be held to cover his undivided interest, and no more.

The fact that the agent of the insurer was aware of the party's interest, and believed and assured him that he had a right to insure the whole, cannot affect this rule. One partner cannot, in his own name, and for his own benefit, insure the interest of his copartner in the partnership stock, even though such may have been the intention of both the insurer and insured.

[1] We are indebted for this case to the kindness of the reporter, T. M. Cooley, Esq.

A policy of insurance contained a clause that no suit or action should be brought upon it unless within twelve months after the loss had occurred. It was held that such a limitation must rest upon the tacit condition that the insurer should be accessible to the service of process, if not for the whole twelve months, at least for a sufficient time immediately preceding its close to enable the insured to commence suit against him by the service of process in the ordinary legal mode.

Where, therefore, process was issued thirteen days before the twelve months expired, but service could not be made on the insurer, it was held that the delay was sufficiently excused, and a new suit might be brought after the expiration of the twelve months.

Where a policy of insurance was conditioned that if gunpowder was kept for sale or on storage, without written permission in the policy, the policy should thereby be rendered void, it was held that if the agent at the time of taking the insurance knew that gunpowder was kept, and was to be kept on the premises, the policy would not thereby be rendered void, whether permission was given in the policy or not.

Notice to the agent that gunpowder was kept, was notice to the insurer; and by accepting the premium and issuing the policy, the latter must be regarded as having waived the condition.

Johnson & Higby, for plaintiffs in error.

O. Hawkins, for defendant in error.

The opinion of the court was delivered by

CHRISTIANCY, J.—This was a suit brought by Hall against the company upon two policies of insurance against loss by fire; one upon a stock of goods in plaintiff's store in the village of Hamburg, Livingston county, Michigan, to the amount of $2000, dated January 13th 1860, and the other for a like amount in the aggregate, upon plaintiff's dwelling-house, furniture, clothing, barn and shed, hay and grain, and on his store-building there situate, the amount insured upon each being specified, that upon the building being $150. This policy is dated August 9th 1859.

The policies on their face are declared to be "made and accepted in reference to the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties in all cases not therein otherwise specially provided for." By the 8th condition annexed, it is declared, among other things, that "the keeping of gunpowder and fire-

crackers for sale, or on storage, upon or in the premises hereby insured, or in any building containing property insured by or under this policy, without written permission in the policy, shall render it void and of no force or effect." The 17th condition is in the following words: "It is further hereby expressly provided that no suit or action against said company for the recovery of any claim under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim so attempted to be enforced."

It was proved on the trial by the plaintiff below, who was sworn as a witness in his own behalf, and the fact was undisputed, that at the time of the application for insurance of the goods, and at the date of the policy, one Helam Bennett was a partner of the plaintiff in business, and as such was the owner of the undivided one-half of the goods insured, and continued to be such partner and owner until the 14th day of March 1860, when the plaintiff bought out his interest. There was evidence tending to show, as to the policy on the goods, that King, the agent of the company, came to the store and wanted to insure the goods; that plaintiff signed the application for the policy, which was mostly blank when signed; that some one came in, and King turned around and said plaintiff could sign it, and he, King, could fill it out; that plaintiff told King he usually sold gunpowder, and everything commonly sold in a country store, and that he intended to do so. And, in reference to the policy on the store, there was evidence that at the time the insurance was taken, the keeping of gunpowder was talked over with King, the agent, and he was told they had powder in the store and was asked if it would make any difference if powder was left for sale, to which he replied "No."

There was also evidence that plaintiff, at the time of the application for the insurance on the goods, told the agent he did not think

he, plaintiff, had a right to insure Bennett's share, and that King replied it would make no difference, that plaintiff had a right to insure the whole.

The fire occurred on the 31st day of March 1860, by which the store-building and the stock of goods were destroyed.

The Circuit Judge charged the jury that "if the agent, King, at the time of the making of the policy on the goods, knew the interest of the parties, that they were jointly owned by the plaintiff and Bennett, and insured the whole stock, the policy would be valid for the whole stock insured." To this charge exception was taken, and this presents the first question we shall consider.

It is evident, from the language of the charge, that it was intended to instruct the jury that if the agent at the time of making the policy knew the interest of the parties, &c., the policy would be valid for the whole amount of the interest of both partners, and that the plaintiff was entitled to recover in this action the whole amount of the loss of all the goods, though his interest at the time of the insurance was but one-half; and though the insurance was in his name alone, and his declaration averred that "at the time of making said policy, and from thence until the loss, &c., he was the owner of said property insured by said policy, and of the value and to the amount by the said defendant insured thereon."

Without attempting to decide what might have been the rule of law, had it appeared from the evidence that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transaction subsequently ratified by the other partner, we think where, as in the present case, there is no evidence of the kind, and its whole tendency is the other way, the rule is well settled in reference to a fire policy like this, that if one partner, or part owner of property held in common, insure in his own name only, the policy will cover his undivided interest and *no more*: *Graves* vs. *Boston Marine Insurance Co.*, 2 Cranch 419, 440; 3 Kent (5th ed.) 258; 2 Duer's Ins., §§ 24 & 20; *Finney* vs. *Bedford Com. Ins. Co.*, 8 Met. 348; *Finney* vs. *Warren Ins. Co.*, 1 Met. 16; *Pearson* vs. *Lord*, 6 Mass. 81; 1 Phil. on Ins. 219, § 391; 1 Arnould on Ins. 146 and note. The

rule may be otherwise where the partner making the insurance has made advances to the firm which, by agreement, are to constitute a lien on the goods insured: 2 Duer on Ins. §§ 19 & 24; 8 La. R. 557.

We do not see how the agent's knowledge of the interest of the parties, nor his belief or assurance that Hall had the right to insure the whole, can affect the question so long as the insurance was not in fact made on the account and for the benefit of the firm. One partner cannot, by reason alone of his interest in the firm as such, insure in his own name, and for his own benefit, the interest of his copartner in the partnership stock. And though such may have been the intention, both of the assured and of the company, on entering into the contract, the policy in legal effect can operate only as an indemnity against loss to the extent of the plaintiff's undivided half of the goods. And if the policy, when made, did not cover the other partner's undivided half, that portion would not be brought within it by the plaintiff's subsequent acquisition of the property from such other partner. The charge was therefore erroneous, and as the verdict of the jury, in accordance with the charge, was for the whole amount of the goods, the judgment must be reversed upon this ground. But as there is to be a new trial, we think it proper to indicate our opinion upon the two other questions raised in the case.

It was objected by the defendant below that the action was not brought within the period of twelve months after the loss, according to the 17th condition attached to the policy. It appears from the bill of exception that a summons was issued in the cause March 18th 1861—thirteen days before the expiration of the twelve months—returnable on the second day of April 1861; that on the 3d day of April 1861, the sheriff made a return upon said summons that defendant could not be found in his bailiwick; that on the next day another summons was issued with which defendant was served, nothing appearing on the summons showing it to be a continuation of the first, except the word "alias" written by the clerk upon the face of the seal.

We do not deem it necessary to discuss the question whether the

second summons, as an alias, operated strictly as a continuance of the first, so as to save a right of action against a statute of limitations, which had run upon it in the mean time; nor do we deem it necessary to determine the validity of this species of limitation by contract. If valid at all, it was valid *as a contract*, and not as a *statute*. A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay beyond the period fixed, unless such excuse be recognised by the statute itself. But a limitation by contract, if valid, must, upon the principle governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period. The plaintiff had the whole of the twelve months in which to bring his suit, and it was as competent for him to institute it on the last as the first, or any intervening day. And the fundamental idea, the tacit condition, upon which such a limitation must rest, and without which it could not be tolerated for a moment, is that the defendant should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close, to enable the plaintiff to commence suit against him by the service of process in the ordinary legal mode, otherwise the defendant would be enabled to take advantage of his own wrong, and by absenting himself entirely to defeat the plaintiff's right of action.

The defendant, in the present case, was a foreign corporation, doing insurance business in this state. By the Act of February 15th 1859, full provision is made for bringing the action within the state; and the company, before doing any business in the state, was required to file in the office of the secretary of state a resolution consenting that service of process may be made upon any agent of the company. Nothing is said in the case upon what agent the service of the second summons was made, but it must have been made upon some agent of the company. It does not appear whether there was an agent in the county of Jackson, or in any other particular county. It appears that S. S. Brown was the general agent of the company for the state, and that

Knight was also an agent; but neither their residence nor place of business is stated. From anything which appears in the case the plaintiff was as much at liberty to bring his action in Jackson as in any other county, so far as the residence of an agent could have any bearing, if, indeed, it could have any under the law; and if an agent of the company resided in Jackson county, the action was certainly being properly brought there.

All that was necessary for the plaintiff to do to excuse the delay beyond the twelve months was to take the proper and usual means for instituting his suit and getting service of process within the limited period, which he did by issuing a summons thirteen days before the expiration of that period, returnable two days after it expired. The return shows that no service could be had during that time. We can see no possible ground for imputing any want of good faith to the plaintiff in his endeavor to get the process served in time. Upon the facts stated in the case, therefore, it appears to have been the fault of the defendant—the absence of an agent—that the first summons was not served, and the action commenced within the twelve months; and this is sufficient to defeat the limitation or extend it till the service was made under the second summons, which was issued immediately on the return of the first.

As to the condition in reference to the keeping of gunpowder, there was evidence from which the jury were authorized to find that the agent knew it was kept at the time, and was to be kept after the insurance, and that he assented to it and induced the plaintiff to believe that it would make no difference.

Upon this point the court charged that "if plaintiff informed the agent that he kept gunpowder in his store for sale, and the agent intended to insure against keeping it, but neglected to indorse the permission on the back of the policy, such neglect would not make the policy invalid." The condition did not provide for any indorsement of this kind upon the policy, but the keeping of gunpowder, was to render the policy void "without written permission in the policy." To this extent the charge was inaccurate; yet we do not think it can be treated as error of which

the company can complain, since we think the plaintiff was entitled to a still stronger charge in his favor. We think he would have been entitled to a charge that, if the agent knew it was kept and to be kept, the keeping it would not render the policy void, whether the permission was indorsed or intended or neglected to be indorsed or not.

But the counsel for the plaintiff in error insists that the printed condition was notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, &c., and that this assent could be given only by the company itself. This, at first view, would seem plausible and might be sound, but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to his principal. The company must be regarded as knowing what he knew. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition; and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss: *Bidwell* vs. *N. W. Ins. Co.*, 24 N. Y. 302; *Frost* vs. *Saratoga Mutual Ins. Co.*, 5 Denio 154; *Masters* vs. *Madison county Mutual Ins. Co.*, 11 Barb. 624; *Campbell* vs. *Merchants' and Farmers' Mutual Ins. Co.*, 37 N. H. 35; *Marshall* vs. *Columbian Ins. Co.*, 27 N. H. 157; *Hartford Prot. Ins. Co.* vs. *Harmar*, 2 Ohio (N. S.) 452; *Howard Fire Ins. Co.* vs. *Brunner*, 23 Pa. St. R. 50; *Clark* vs. *Union Mutual Fire Ins. Co.*, 40 N. H. 333. And see Angell on Ins. § 480.

We see no error in the record or proceedings in the court below, except that in reference to the interest of the plaintiff at the time of the insurance. For this error the judgment must be reversed, with costs, and a new trial granted.

All the justices concurred.

Court of Common Pleas of the City of New York.

ELIZABETH BURTON *vs.* CECILIA BURTON AND JOHN J. CRANE, Executors, &c., of WILLIAM E. BURTON, deceased.[1]

An alien woman married to an alien in a foreign country and continuing to reside there until her husband's death did not become a citizen of the United States by the naturalization of her husband subsequent to their marriage.

She is, therefore, not entitled to dower under the laws of the state of New York.

Construction of the Act of Congress of 10th February 1855, sec. 2.

The plaintiff, by this action, seeks to have her dower admeasured in the lands whereof William E. Burton died seised. She alleges in her complaint that the plaintiff and William E. Burton were married in England on the 10th April 1823, and to bring the case within the Acts of Congress in relation to the naturalization of aliens, she having, until after Burton's death, remained in England, embraces in her complaint the following peculiar allegation:—

"That she then was, and ever since hath been and is a free white woman."

She further alleges that William E. Burton died seised and possessed of the property described in the complaint, on the 10th day of February 1860, having devised the same to the defendants in fee.

The defendants, by their answer, denied the marriage, and as a second defence set up the naturalization of Burton on the 8th day of October 1840, in Pennsylvania; that the plaintiff was an alien, having, ever since the pretended marriage, been, and still being, a subject of Great Britain; and, therefore, not entitled to dower in the lands of the testator.

To this second defence the plaintiff demurred.

Charles O'Connor and *B. F. Dunning*, for the plaintiff.—Burton, being a citizen of the United States on the 10th day of February 1855, the plaintiff, as his wife, by force of the Act of Congress

[1] We are indebted for this case to the courtesy of Edmund R. Robinson, Esq., of New York.

passed on that day, also became a citizen of the United States, nothing in the Act of 1802 could be construed as requiring an actual residence here; by construction of law the plaintiff's residence, at the time of the passage of the Act, was the same as that of her husband. Under the act of the legislature of this state, passed April 30th 1845, the plaintiff was entitled to recover her dower.

Edmund R. Robinson, for defendants.—An alien is not entitled to be endowed of lands of her husband, whether he was a citizen or not. The plaintiff does not come within the Act of Congress of 1855, because, until after the death of Burton, she never resided or came within the United States.

The opinion of the court was delivered, March 17th 1864, by

BRADY, J.—In this case a question is presented, for the first time, which involves a construction of the 2d section of the Act of Congress, passed on the 10th February 1855, which is as follows :—

"Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States:" (10 Statutes at Large, p. 604, § 2; Brightly's Digest, p. 132, § 2.)

The plaintiff was the wife of William E. Burton, now deceased. They were both born in Great Britain. After their marriage, Mr. Burton came to this country and continued to be a resident thereof until his death. He was duly naturalized in the year 1840. The plaintiff continued to be a resident of her native land until after the death of her husband, when she came to this country, and in this action, under and by virtue of the Act of Congress referred to, claims a right of dower in the lands of which he died seised. The difficulties which present themselves in this case arise from the ambiguity of the section which has been recited. What is meant by the words "any person, who might lawfully be naturalized under the existing laws, married to a citizen of the United States"?

The rest of the section is free from obscurity. The language employed by the lawgivers would seem to extend the rights of citizenship to every woman married to a citizen of the United States, whether such marriage took place before or after the husband became a citizen, and whether the wife was or was not a resident of this country, either at the time of the marriage or subsequently.

Did the Congress of the United States, enacting this law, intend that it should have such an effect? We must, as suggested by Chief Justice TANEY, gather their intention from the language used, comparing it, where ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed; *Aldridge* vs. *Williams*, 3 How. U. S. Rep. 24; and adopting that suggestion as a guide, a conclusion may be drawn, which will remove the doubts and reveal the design of the act under consideration. The act itself was framed (see section first) in reference to the issue of citizens of this country born abroad. Necessity for legislation on that subject undoubtedly provoked it. A very able review by Mr. Horace Binney of the acts of Congress in force on that subject and of the various attempts to remedy the existing legal defects will be found in 2 American Law Register 193, and I entertain the belief that the review mentioned contributed much to the enactment of the law. It will not be necessary for the determination of the question involved in this case, however, to consider in detail the whole scope of legislation upon the subject of the citizenship of children born abroad whose parents were or whose father was a citizen of the United States, but to refer to it as incidental to the question on hand, the two subjects embraced in the Act of 1855 being kindred to and growing out of each other. It will be sufficient, therefore, in relation to the subject embraced in the first section of the Act of 1855 to say that under the then existing laws the child of a citizen of the United States born abroad was an alien, and that even under the Act of Congress passed in 1802 (Brightly's Digest, p. 35), the child of an alien mother born abroad was an alien although the father was in fact a citizen.

Some attempts were made in Congress to remedy this, and bills were introduced for that purpose. One reported by Mr. Wall in 1841, another introduced by Mr. Webster in 1848, and still another by Mr. Bradbury in 1852. None of these bills were passed, however—they were unlike in phraseology or dissimilar in scope. The bill reported by Mr. Wall contained no express provision in reference to women. The bill of Mr. Webster provided that the children of citizens of the United States born out of the limits of the United States should be considered as citizens of the United States, and also by the second section, "that every woman married, or who should be married to a citizen of the United States, and should continue to reside therein, should be deemed and taken to be a citizen of the United States." The bill introduced by Mr. Bradbury was precisely the same as Mr. Webster's; but the Judiciary Committee recommended that the second section should be stricken out. (Review of Mr. Binney, *supra;* see, also, Congressional Globe, and Appendix, Second Session, Twenty-sixth Congress, pp. 181–212; Congressional Globe, First Session, Thirtieth Congress, p. 834—Mr. Webster's remarks, and p. 844, his bill; Congressional Globe, Part Second, Twenty-fourth Volume, First Session, Thirty-second Congress, pp. 991–1352.) It will thus be seen that legislation in Congress, so far as it extended to alien wives prior to the year 1855, contemplated a continued residence by them in this country, which was the effect of the provision in Mr. Webster's bill, and, as we have seen, the Judiciary Committee, at a subsequent period, recommended that even the grant of that privilege should be discountenanced. The conditional qualification of continued residence by the wife may have been regarded as objectionable, because it was not imposed upon the husband, and his civil condition might continue, while hers would change. But whether that was so or not, no substitute was suggested for that section by the committee. The assault upon it was sweeping. The Act of 1855, therefore, as we glean from this previous legislation, though unfinished, the history of the legislative object to be attained by it, and as well the general considerations which influenced nations in framing naturalization laws, was

designed, certainly, for the benefit of an alien white woman, whether resident or not, married to a person who was at the time of the marriage a citizen of the United States, thus securing, by the same law, the rights of citizenship to the children of American citizens born abroad, and to such alien wife all legal rights of citizenship, which otherwise, and by reason of her alienism, she might not possess. (See opinion of Judge INGRAHAM in case of *Greer* vs. *Sankston*, decided in the Supreme Court, First District, adopting a like construction upon similar phraseology in a kindred case.)

This was, in my judgment, the primary object of the act, if it be not the full scope of its intent. It was a legislative measure passed in reference to citizens of the United States, and bearing upon such marital relations with alien women as they might establish. Construed with liberality, however, it might be held, also, to extend to an alien woman resident in this country, though married abroad to an alien, and who came to this country with him or followed him here, or in that way, or in one of these ways, identified herself with the country of his adoption. Such a construction would produce an affect analogous to that of the statute which confers citizenship upon the alien minor children, dwelling in the United States, of a person who becomes a citizen. (Act, Brightly's Digest, p. 35, § 3.)

In this case, the plaintiff has neither sought to derive the benefit of her husband's naturalization by coming with or following him here, nor entitled herself to the benefit of a liberal construction in her favor of the act, as suggested, by a residence in this country of any duration prior to her husband's death. Her rights, therefore, as a citizen, depend entirely upon the construction of the section of the statute under consideration, and I am of the opinion that she has no claim upon her husband's estate thereunder. He was not, when he married her, a citizen of the United States, and she was never a resident thereof during his life. On the contrary, she was and continued to be both alien and stranger.

The plaintiff being an alien, and having married an alien, and not having resided in this country prior to her husband's death,